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No. 85-445

In the Supreme Court of the United States

OCTOBER TERM 1985

PETER DEFAZIO, et al.,
Petitioners,

v.

THE CITY OF SPRINGFIELD,
by and through
THE SPRINGFIELD UTILITY BOARD, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS WASHINGTON PUBLIC POWER SUPPLY SYSTEM, et al.

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BRIEF IN OPPOSITION OF RESPONDENTS WASHINGTON PUBLIC POWER SUPPLY SYSTEM, et al.[1]

The petition does not disagree with the result reached by the court of appeals and by the district court. Rather, petitioners contend that discovery should have been ordered under Fed R Civ P 56(f) before those courts decided legal issues presented by the cross-motions for summary judgment. The petition meets none of the standards for review by this Court. In addition, the federal and regional interest in preserving the decision of the court of appeals is enormous. The petition is mischievous as well as insubstantial.

[1] These respondents are identified as parties in the petition (at ii and iii). WPPSS and PGE have no parent companies, subsidiaries or affiliates. The following companies are affiliated with PACIFICORP, dba PACIFIC POWER & LIGHT COMPANY:
(footnote carried forward)

STATEMENT OF THE CASE

The action was filed November 15, 1982 by the City of Springfield, Oregon, to determine the validity of its net billing agreements with Bonneville Power Administration and Washington Public Power Supply System for power from Supply System Nuclear Projects 1, 2 and 3 (App A). Springfield joined as defendants all parties with an interest in those projects, including BPA, the Supply System, four large private utilities, and over 100 Northwest public utilities. The source of Springfield's concern was litigation in the Oregon state courts in which petitioners and others attacked the validity of participants' agreements between various public utilities and the Supply System

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(Footnote continued)

Second-tier Subsidiaries
NERCO, Inc.

Third-tier Subsidiaries
Pacific Telecom, Inc.

Fourth-tier Subsidiaries
American Network, Inc.
Associated P & C Engineers, Inc.
Constant Broadcasting Company
Flight Dynamics, Inc.
Gem State Utilities Corporation
Multi Visions, Inc.
Norcom Construction, Inc.
International Communications Services, Inc.
Pacific Telecom Construction
Ron Morris Construction Company
Sertel, Inc.
Tel Com Construction Company
Northwestern Telephone Systems, Inc.
Shared Use Network Services, Inc.

alone for power from Nuclear Projects 4 and 5. Similar litigation was pending in state courts in Washington and Idaho.

The Oregon litigation had raised concern over the validity of the net billing agreements, and over the value of $6 billion of Supply System bonds which had been sold to finance Nuclear Projects 1, 2 and 3. That concern created impediments to further financing of Projects 2 and 3, which were under construction. Accordingly, the parties sought an expedited resolution of the controversy.

The district court promptly held status conferences and established a schedule to resolve jurisdictional issues and motions for summary judgment which some of the parties wished to file (Pet App C). Counsel for petitioners attended the status conferences, but delayed until the last day allowed by the court to file a petition to intervene. When he did so, petitioners made no effort to accommodate the court's schedule, but tried to extend the proceedings with a series of motions seeking delay (Pet App D.) Their stated reason for intervening was to protect their position in the litigation in state court, so that a decision in this case would not "impact or affect" their attack on Springfield's participants' agreements for power from Nuclear Projects 4 and 5 (App B).

The district court denied petitioners' motions to rearrange its schedule, and imposed on them the same timetable it had imposed on the other parties. The court also offered them discovery if they should show

it was needed (Pet App D). When they failed to do so, the court on May 16, 1983 entered summary judgment sustaining the validity of the net billing agreements (Pet App E).

Thereafter, the Washington and Idaho Supreme Courts held in pertinent part that the participants' agreements for power from Nuclear Projects 4 and 5 were not power sale contracts, and were not authorized by the laws of those states because the utilities carried the risk of project failure (the so-called "dry hole risk") and might have to pay large sums without receiving any power. *Chemical Bank* v. *WPPSS*, (1983) 99 Wash 2d 772, 666 P2d 329; *Asson* v. *City of Burley*, (1983) 105 Id 432, 670 P2d 839, *cert denied* (1984) 105 S Ct 219. Both courts distinguished the net billing agreements relating to Nuclear Projects 1, 2 and 3 from the participants' agreements. 666 P2d at 332-33; 670 P2d at 344. The Washington court, citing the district court's opinion in this case, noted that the net billing agreements "apparently may be characterized as contracts for the purchase of power" in which BPA has given an "indirect guaranty" against the dry hole risk. 666 P2d at 332-33. The Idaho court went even farther, and held that its decision was not applicable to the net billing agreements, "even by analogy." 670 P2d at 850.

In 1984 petitioners lost their case in the Oregon courts. The Oregon Supreme Court held that the participants' agreements for power from Nuclear Projects 4 and 5 were authorized under Oregon law. *DeFazio* v. *WPPSS*, (1984) 296 Or 550, 679 P2d 1316.

While the district court relied on federal law to sustain the net billing agreements, the court of appeals concluded that the issue should be decided by borrowing state law [2] and referred to *Chemical Bank* and *Asson* for its standards. See 752 F2d at 1427-28; 564 F Supp at 95. In the end, this made no difference. Both courts concluded that the net billing agreements, as a matter of general contract interpretation, impose the dry hole risk on BPA and do not obligate the utilities to pay for power they do not receive. Consequently, those agreements are power sales contracts, which nobody denies are authorized by any applicable state law. 752 F2d at 1429; 564 F Supp at 95.[3] There was no fact issue which required discovery, and summary judgment was appropriate. 752 F2d at 1427.

REASONS FOR DENYING THE PETITION

1. Simply stated, the question is whether this Court should review the decision of both the district court and the court of appeals declining to order discovery of the bond resolutions (and other documents that petitioners do not discuss). Petitioners contend (Pet 13-17) [4] that this was a departure from "the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to

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[2] These respondents contended in both courts below that the net billing agreements are federal contracts, and are controlled by and are valid under federal law. If the petition should be granted, they will assert that position in this Court, which

(footnote carried forward)

call for an exercise of this Court's power of supervision." See Rule 17.1(a). Yet, despite the importance of the case to BPA and the entire Pacific Northwest, the only ruling complained of was made by both lower courts and concerns the narrow issue of whether petitioners made a sufficient showing under Fed R Civ P 56(f) to delay a decision on the motions for summary judgment. No question of legal moment is raised, and the petition turns on the peculiar facts of this single case.

In *Appalachian Power Company* v. *American Institute,* (1959) 4 L Ed 2d 30 Justice Brennan refused to stay a court of appeals mandate, because

> "* * * ordinarily an application by a District Court of the Rules of Civil Procedure when affirmed by the Court of Appeals will not be re-

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(footnote continued)
would provide an alternative ground for affirming the court of appeals.

[3] The court of appeals' decision of an issue of state law is a poor candidate for certiorari. "* * * [A]challenge to state-law determinations by the Court of Appeals will rarely constitute an appropriate subject of this Court's review." *Haring* v. *Prosise,* (1983) 462 US 306, 314 n.8.

[4] There is no precedent for petitioners' unusual argument that this was not a case or controversy for lack of evidence of the bond resolutions (Pet 10-13). In *Nat. Conference of Catholic Bishops* v. *Smith,* (D.C. Cir. 1981) 653 F2d 535 the complaint was dismissed for failing to allege the elements of a controversy and because there was no showing of any regulatory impact on plaintiffs. 653 F2d at 539-40. *Smith* does not remotely resemble this case.

> viewed by this Court. This is particularly true where, as here, the question is one that concerns the judgment of the District Judge in relation to a particular set of facts." 4 L Ed 2d at 32.

See also United States v. *ITT Continental Baking Co.*, (1975) 420 US 223:

> "* * * [T]he issue of whether there were any violations concerns only a particular order as applied to a discrete set of facts and therefore would not merit this Court's grant of a petition for certiorari." 420 US at 227 n.2.

2. The *DeFazio* decision [5] sustained the authority of Oregon public utilities to enter into the participants' agreements under which the utilities carried the dry hole risk. That decision foreclosed any substantial criticism of the net billing agreements of Oregon utilities, and petitioners do not express doubt about the authority of *their* utility, the City of Springfield, Oregon, to enter into the net billing agreements. They suggest only that the agreements of Washington and Idaho utilities may be invalid, despite the contrary observations by the supreme courts of those states, and, if so, that several hundred net billing agreements — including Springfield's — may be avoided under principles of commercial frustration. [6]

Petitioners expressed no interest in such a deter-

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[5] *DeFazio* v. *WPPSS, supra,* (1984) 296 Or 550, 679 P2d 1316.

[6] *See Chemical Bank* v. *WPPS,* (1984) 102 Wash 2d 874, 691 P2d 524, *cert denied* (1985) 105 S Ct 2140.

mination when they entered this case and should not be allowed to assert one now. As Springfield ratepayers, they have no standing to attack the validity of hundreds of contracts between other persons on such an attenuated basis, particularly now that Springfield's contracts are plainly valid. *See Davis & Farnum Mfg. Co* v. *Los Angeles,* (1903) 189 US 207, 219-221; *Williams* v. *Eggleston,* (1898) 170 US 304, 309.

3. Petitioners are less than frank in suggesting that they do not know the contents of the bond resolutions. The affidavit of their counsel states that he has seen the bond resolutions for Nuclear Projects 4 and 5 and has "reason to believe" that the resolutions for Nuclear Projects 1, 2 and 3 "read the same" and bear "the same legal interpretation" (App C). He does not even attempt to suggest how those documents might qualify the plain terms of the net billing agreements, which both the district court and the court of appeals found to be unambigous. Counsel's failure to explain the significance of any of the bond resolutions to the issues of this case destroys any credibility that might otherwise attach to the petition. Petitioners have not demonstrated a need for the documents that would justify further proceedings. *See ISI Corporation* v. *United States,* (9th Cir 1974) 503 F2d 558, 559.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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Washington Public Power
Supply System

STEPHEN S. WALTERS
Counsel for Respondent
Pacific Power & Light Company

BARBEE B. LYON
Counsel for Respondent
Portland General Electric
Company

October 11, 1985

APPENDIX A

(The Complaint)

Plaintiff City of Springfield, acting by and through the Springfield Utility Board (hereinafter referred to as "Springfield") brings this action for a declaratory judgment against Defendants and for other relief, and states as follows:

PARTIES

1. Plaintiff Springfield is a municipal corporation organized and existing under the laws of the State of Oregon.

2. Defendant Washington Public Power Supply System (hereinafter referred to as "Supply System") is a municipal corporation of the State of Washington organized as a joint operating agency under RCW 43.52 and is the owner of Washington Public Power Supply System Nuclear Projects 1 and 2 and is a part owner of Project 3 (hereinafter referred to as "Projects"). The said projects are presently under construction.

3. Defendant City of Eugene, acting by and through the Eugene Water and Electric Board (hereinafter "EWEB") is the owner of 30% of the Trojan Nuclear Project (hereinafter referred to as "Trojan") and, as the owner of said project, has executed a three-part Net Billing Agreement with the United States Government, acting by and through the Bonneville Power Administration, and with various Participants. EWEB's interests in Trojan may be affected by a declaration of this Court.

4. Defendant Peter Johnson is the Administrator of Defendant Bonneville Power Administration (hereinafter referred to as "Bonneville"), an agency of the United States Department of Energy which has executed net-billing contracts with the Supply System relating to Projects 1, 2 and 3, and with EWEB and certain participants relating to Trojan. Bonneville's interests in the Projects and Trojan may be affected by a declaration of this Court.

5. The Washington Water Power Company, Puget Sound Power & Light Company, Portland General Electric Company and Pacific Power & Light Company (hereinafter collectively referred to as "investor-owned utilities") are corporations organized in Washington, Oregon and Maine, respectively, each of which has executed an ownership agreement as of August 17, 1973 with the Supply System relating to Project 3. In addition, Defendants Portland General Electric Company and Pacific Power & Light Company have ownership interests in 70% of Trojan. A declaration in this case may affect the interests of said investor-owned utilities.

6. Defendants City of Milton-Freewater and City of McMinnville are Oregon municipalities and were defendants in that certain lawsuit entitled *Peter DeFazio, et al* v. *Washington Public Power Supply System, et al,* Lane County Circuit Court Case No. 16-81-11344. Defendants City of Drain, Canby Utility Board, a subdivision of the City of Canby, the City of Bandon, the City of Cascade Locks are each municipalities of

the State of Oregon and were plaintiffs in the aforesaid *DeFazio* case. Each of said Defendants herein are bound by the judgment of the Lane County Circuit Court in the *DeFazio* case and have interests that may be affected in one or more of Projects 1, 2 and 3 and Trojan by this Court's declaration.

7. Defendants herein, Central Lincoln Peoples' Utility District, Northern Wasco Peoples' Utility Dis-Peoples' Utility District, are municipal corporations and peoples' utilities districts authorized by Article XI, Section 12 of the Oregon Constitution and organized under chapter 261, Oregon Revised Statutes. Each of the aforesaid Defendants were third party defendants in the *DeFazio* case and have interests which may be affected in one or more of Projects 1, 2, 3 and Trojan by a declaration of this Court.

8. The plaintiffs and defendants referred to in paragraphs 6 and 7 are referred to hereafter as Oregon Public Participants.

9. The other Defendants named in the caption but not referred to above (hereinafter referred to as "Non-Oregon Public Participants") are entities organized in the states indicated in the caption, each of which has executed Net Billing Agreements or Participants' Agreements pertaining to one or more of the projects, and Trojan. A list of the respective Participants involved in each of the Projects and Trojan is attached as Exhibit "A" and incorporated herein by reference. Each of said Non-Oregon Public Participants may be

affected by a declaration of this Court by a finding that Oregon Participants lacked authority to enter into Projects 1, 2, 3 and Trojan and may increase their Participants' share up to 25% pursuant to the Net Billing Agreements. Each such Defendant has the legal capacity to sue and be sued in its own name. It is anticipated that some of such Defendants may wish to align themselves as Plaintiffs rather than Defendants in this action, and the Plaintiff therefore requests the Court to make an appropriate realignment of the parties pursuant to their requests.

JURISDICTION AND VENUE

10. This Court has jurisdiction of this matter under 28 U.S.C. § 1331.

11. This Court is a proper venue for this action, under 28 U.S.C. § 1391, in that one or more of the Defendants resides in this district and Plaintiff's cause of action arose, in whole or in part, in this district.

FIRST CLAIM FOR RELIEF

The Facts

12. On or about October 5, 1970, Springfield, among other Participants more particularly described in Exhibit "A", entered into a three-party Net Billing Agreement relating to Trojan with Defendant EWEB and Defendant Bonneville. A copy of said three-party Agreement is attached as Exhibit "B" and incorporated herein by reference.

13. On or about the following dates, Springfield entered into Net Billing Agreements with the Supply System and Bonneville relating to the designated Projects:

Project No. 1 — 2/6/73;
Project No. 2 — 1/4/71;
Project No. 3 — 9/25/73.

Copies of the three foregoing Agreements are attached as Exhibits "C," "D," and "E," respectively, and incorporated herein by reference. Said Agreements are identical to ones entered into by the other Participants at or near the same dates set forth above.

14. Pursuant to its obligations incurred under the three-party Agreement relating to the Trojan Project, Springfield has been paying its percentage share of Project capability as designated in said Agreement. Since March, 1980, December, 1976, and May, 1982, respectively, Springfield has been paying its percentage share of the construction costs for Washington Nuclear Power Projects 1, 2 and 3 as provided for in the attached Net Billing Agreements.

15. Plaintiff contends that at all material times, it had full legal authority to execute the Net Billing Agreements relating to the Projects and the three-party Agreement relating to Trojan.

16. On July 14, 1976, Plaintiff and Oregon Public Participants and Non-Oregon Public Participants entered into a Participants' Agreement with the Sup-

ply System relating to the construction of Washington Nuclear Projects 4 and 5. A copy of this Participants' Agreement is attached as Exhibit "F" and incorporated herein by reference.

17. On December 17, 1981, the above-referenced *DeFazio* action was filed in the Lane County Circuit Court, Oregon, wherein certain plaintiffs sought a declaration by said Court that the aforesaid Plaintiff and Oregon Public Participants lacked legal authority to execute the Participants' Agreement relating to Projects 4 and 5.

18. On November 5, 1982, the Honorable George J. Woodrich, Lane County Circuit Court Judge, entered certain Findings of Fact and Conclusions of Law in said suit, including the following

(a) "The obligations of Municipal Participants under the Participants' Agreement constitute 'debts,' 'indebtedness' or 'liabilities' as those terms are used in the charters of Municipal Participants.

(b) The obligations of Municipal Participants under the Participants' Agreement exceeded their respective debt limitations and are not exempt therefrom by virtue of the special fund doctrine or any other principle of law. The Participants' Agreement is a guaranty of another (WPPSS) obligation (bonds) to be paid from the revenues of the municipality and without legal ownership, adequate control or

limitations upon the projects and in potential amounts that are the practical equivalent of a general tax on the people of the municipality.

(c) Municipal Participants do not have statutory or charter authority to enter into such guaranty, security relationship or pledge, nor do they have statutory or charter authority to exercise extramural powers.

(d) No Oregon statute authorizes the execution of the Participants' Agreement.

(e) By entering into the Participants' Agreement, the Municipal Participants became shareholder-investors in WPPSS and Projects 4 and 5 in violation of Article XI, Section 9 of the Oregon Constitution.

(f) By entering into the Participants' Agreement the Municipal Participants raised money for and loaned their credit to WPPSS in Projects 4 and 5 in violation of Article XI, Section 9 of the Oregon Constitution.

(g) By entering into the Participants' Agreement the Municipal Participants unlawfully delegated their legislative powers [of rate making] and the Participants' Agreements constitute an unlawful binding of future councils or boards."

A complete copy of the Findings of Facts and Conclusions of Law entered by Judge Woodrich is attached as Exhibit "G" and incorporated herein by reference.

19. At the time of its execution of the net Billing Agreements on Projects 1, 2 and 3, as well as its execution of the three-party Agreement relating to the Trojan Project, Springfield's payment obligations thereunder were and are substantially the same as its obligations under the Participants' Agreement executed in connection with Projects 4 and 5. The following features, among others, are common to all of the aforesaid Agreements:

(a) The Participants' obligation to pay their percentage share regardless of whether or not the Projects were completed;

(b) A rate covenant requiring the Participants to adjust their respective utility rates to cover their corresponding obligations under the agreements;

(c) The absence, at the time of executing the agreements, of a finite ceiling on the ultimate cost of the projects.

20. Defendants Northern Wasco Peoples' Utility District, Tillamook Peoples' Utility District, Clatskanie Peoples' Utility District and Central Lincoln Peoples' Utility District have taken the legal position in the aforesaid *DeFazio* case that net billed Projects 1, 2, 3 and Trojan are dissimilar from Projects 4 and 5 which are not "net billed" due to the fact that Bonneville has an obligation to make payments upon nonpayment by any Participant under the Net Billed Projects. Defendant Supply System took the contrary legal

position in the *DeFazio* case contending that invalidation of Projects 4 and 5 by the Lane County Circuit Court would invalidate Net Billed Projects 1, 2, 3 and Trojan because Bonneville did not have an obligation of payment in the event of nonpayment by any Participant.

21. ORS 294.100(2) provides as follows:

> Any public official who expends any public money in excess of the amounts, or for any other or different purpose or purposes then authorized by law, shall be civilly liable for the return of the money by suit of the District Attorney of the district where the offense is committed, or at the suit of any taxpayer of such district.

22. By virtue of the foregoing statute, the members of the Oregon Public Participants' Boards will incure substantial personal risk to the extent they continue to make the payments under their contract obligations pursuant to the Agreements as alleged in paragraph 14 hereinabove if said agreements alleged herein are void *ab initio.*

23. For the above reasons, the aforesaid decision by Judge Woodrich in the *DeFazio* case has created uncertainty and controversy over Plaintiffs' and other Oregon Public Participants' obligations under the Net Billing Agreements on Projects 1, 2, 3 and Trojan and their authority to enter into said Net Billing Agreements until this Court declares whether Bonneville has an obligation of payment to Supply System in the event

of nonpayment by an Oregon Public Participant and such obligation exempts said Net Billing Agreements from the *DeFazio* decision.

24. By reason of the above, there is a genuine and justiciable controversy among the parties concerning their respective obligations under the Agreements relating to Projects 1, 2 and 3 and Trojan which will affect the Oregon Public Participants' legal authority in entering into said Agreement *ab initio*.

ALTERNATIVE CLAIM TO DECLARATORY RELIEF

In the alternative, Plaintiff alleges:

25. Realleges paragraphs 1 through 23 of its First Claim.

26. If the appellate courts of Oregon uphold Judge Woodrich's judgment in the *DeFazio* case on appeal, and if this Court finds that Bonneville's statutory authority to pay nonpaying Participants' obligations on the Net Billing Agreements is ambiguous, then Bonneville should be held liable to pay all costs attendant to said Net Billed Projects on behalf of the Oregon Public Participants and to increase its base rates to all its customers in that Bonneville, by its own conduct in entering into said agreements and its public pronouncements thereon, led the Oregon Public participants to believe that in the event of nonpayment by any Participant Bonneville had the duty to do the following:

(a) Attempt to reassign the nonpaying Participants' share to other customers or other Participants willing to accept said assignment; or

(b) Reassign the nonpaying Participants' share to all other Participants in the Project pro rata up to 25%; or

(c) In the event alternatives (a) and (b) above were impossible, Bonneville was to pay said nonpaying Participants' share from its own revenues and increase its rates to all customers thereafter.

Plaintiff and all other Participants relied upon Bonneville's contractual obligations and public pronouncements thereof to their detriment and Bonneville is estopped from claiming it has no duty of payment on behalf of any Participant which legally cannot pay its Participants' share.

WHEREFORE, Plaintiff prays for relief as follows:

(1) For a declaration of this Court that Plaintiff and Oregon Public Participants had full legal authority to enter into the Net Billing Agreements on Projects 1, 2, 3 and Trojan by reason of Bonneville's obligations thereunder.

(2) In the alternative, if Plaintiff did not have the legal authority to enter into the Net Billing Agreements on Projects 1, 2, 3 and Trojan, Bonneville is liable to Supply System to make

such payment and estopped to claim its lack of obligation to do so.

(3) Awarding to Plaintiff reasonable costs and attorneys' fees against Bonneville.

(4) Awarding Plaintiff such other and further relief as may be just and proper.

APPENDIX B

(Affidavit of Petitioners' Counsel Supporting Motion to Intervene)

STATE OF OREGON)
) ss.
County of Lane)

I, Robert L. Ackerman, being first sworn, state that I am the attorney for the potential intervenors in this case. I have reviewed the pleadings filed by the City of Springfield, the Washington Public Power Supply System and the Bonneville Power Administration.

I am the attorney for Peter DeFazio et al (Springfield Ratepayers) in that claim that was filed in Lane County Circuit Court on or about December 21, 1981 against the Washington Public Power Supply System and the City of Springfield, Lane County Circuit Case No. 16-81-11344.

The purpose of that case was to challenge the authority of the City of Springfield to enter into a Participants' Agreement with the Washington Public Power Supply System with respect to the financing of nuclear projects 4 and 5 that were under construction in the State of Washington. Plaintiffs' challenge was based upon the claim that the City of Springfield lacked the Oregon constitutional, statutory and charter authority to enter into the Participants' Agreement.

The City of Bandon, City of Canby, City of Cascade Locks, and the City of Drain intervened as plaintiffs in the *DeFazio* case. All plaintiffs joined in challenging the authority of the Oregon municipal participants to enter into the Participants' Agreement with the Washington Public Power Supply System on constitutional, statutory and charter grounds. The cities of McMinnville and Milton-Freewater intervened in *DeFazio* as defendants.

The *DeFazio* case was concluded by final judgment that held in the plaintiffs' favor that the Participants' Agreement was ultra vires and void based upon a lack of certain constitutional, statutory and charter authority. That case is now on appeal to the Court of Appeals of the State of Oregon.

The Complaint in this case raises issues with respect to net billing agreements entered into between the City of Springfield, the Bonneville Power Administration and the Washington Public Power Supply System with respect to the construction of nuclear projects 1, 2 and 3 in the State of Washington. The Complaint also raises issue with respect to the plaintiffs' net billing agreement with the City of Eugene and the Bonneville Power Administration with respect to the Trojan Nuclear facility. Plaintiff alleges that all parties had full authority to execute those net billing agreements but contends that the obligations of the City of Springfield with respect to those net billing agreements are uncertain because they are similar to the agreements that were invalidated in the *DeFazio* litigation.

The defendants, City of Bandon, City of Canby, City of Cascade Locks and City of Drain, although they were plaintiffs in *DeFazio*, are defendants in this case and have taken the position that the net billing agreements with respect to nuclear projects 1, 2 and 3 with the Bonneville Power Administration, the Washington Public Power Supply System and other signatories to those agreements are valid. Therefore, there is no party in the present case that will represent the interests of the potential intervenors on the Oregon authority issues with respect to the net billing agreements for Projects 1, 2 and 3.

The plaintiff also raises authority issues with respect to this net billing agreement with the Bonneville Power Administration, the City of Eugene and various participants with respect to the Trojan Nuclear Generating facility. There is no party in this case that will represent the interest of the potential intervenors on the Oregon authority issues raised by the plaintiff in that phase of this case.

The Columbia Rural Electric Association, Inc. has raised issues in its pleading with respect to the authority of the Bonneville Power Administration to enter into the net billing agreements for nuclear projects 1, 2 and 3. The potential intervenors intend to join that defendant in those claims, however, that defendant does not have standing to assert the authority issues that will be raised by the potential intervenors with respect to the plaintiff's net billing agreement with the Bonneville Power Administration, the

City of Eugene and various participants with respect to the Trojan Nuclear Generating facility.

The potential intervenors have an interest in the transaction which is the subject of the action by the plaintiff because the plaintiff has alleged that its net billing agreements with respect to nuclear projects 1, 2 and 3 and the Trojan Generating facility are similar to those that were invalidated in *DeFazio*. The potential intervenors have an interest in this litigation in order to establish that the agreements are identical in law and in fact and should be invalidated on the authority issues raised in *DeFazio* or in the alternative, if the agreements are not similar that any finding or conclusion of this Court that the parties had the requisite authority to enter into those agreements is based on a separate factual and legal premise that will not impact or affect the *DeFazio* decision.

All contentions raised by the potential intervenors with respect to the ability of the participants to enter into the net billing agreements that have been raised by the plaintiff's Complaint involve common questions of law and fact.

APPENDIX C

Extract from Affidavit of Petitioners' Counsel Supporting Motion for Continuance

* * * An itemization of the requested documents are attached as Exhibit A. The reasons why they create questions of fact are as follows:

1. *The Bond Resolutions.*

Each of the net billing agreements are subject to bond resolutions. Bond resolutions are part of the net billing agreements and form a contractural relationship between the participants and the bond holders. The rights of the bond holders are defined in the resolution. The bond resolution of the Participants' Agreement give the bond holders certain rights against the Supply System and the participants in the event of a default. The court must construe the entire agreement. The bond resolutions are an integral part of the agreement. The bond resolution may show that the participants are liable for the default of the Supply System. This supports our claim that the net billing agreements constitutes a guarantee that may have been beyond the lawful authority of the participants. I have not had access to the bond resolutions that involve the contracts at issue in this case, but I am familiar with the terms of the bond resolution rising out of the Participants' Agreement. I am familiar with the bond financing scheme under both agreements. Therefore I have reason to believe that the bond resolutions will read the same and be subject to the same legal interpretation.